Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

In the Matter of	)	
	)	
Appropriate Framework for Broadband Access to the Internet over Wireline Facilities	)	CC Docket No. 02-33
	)	
Universal Service Obligations of Broadband Providers	)	
	)	
Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements	)	CC Docket Nos. 95-20, 98-10

COMMENTS OF

Z-TEL COMMUNICATIONS, INC.

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SUMMARY

The Commission's proposal in this proceeding should be soundly and swiftly rejected. Indeed, if the Commission treads down the path proposed in the *NPRM*, it would actually undermine Congressional intent, dismantle the policy framework of the 1996 Act, and adversely impact competitive choice for all consumers.

Z-Tel Communications, Inc. ("Z-Tel") is among the nation's largest, competitive providers of mass-market local telephone service. Z-Tel's services are available to residential consumers in 38 states, and Z-Tel has over 250,000 retail subscribers. To offer these services Z-Tel relies on *ubiquitous* availability of unbundled access via section 251(c)(3) of the Act to the incumbent LEC local networks, including the last-mile infrastructure. In these Comments, Z-Tel shows that allowing incumbent LECs to shut down entire neighborhoods and towns to competitive entry by companies like Z-Tel would harm consumers throughout the region, state and nation.

The Commission's proposals would risk giving incumbent LECs the ability to render *any* portion of that last-mile infrastructure "unbundleable" for any service once the incumbent LEC chooses to offer a particular form of Internet access service over those facilities.

The Commission's proposal fails to understand one key fact: the purpose of the *Computer* regimes, the MFJ, and Congress's subsequent codification of those definitions in 1996 was to wall off or shield the information services industry from the market power in their incumbent local networks. In other words, **Congress decided to treat incumbent LEC networks differently.** Congress had legitimate reasons: only the incumbent LECs own networks that pass virtually every home and business in America,

only incumbent LECs have greater than 90% of the market for local phone service, and only incumbent LECs were bequeathed this dominant market position by 60-plus years of guaranteed local monopolies. And only last year, in the *CPE/Enhanced Services Bundling Order*, the Commission recognized that the last-mile network market power that has not subsided since those walls were put in place.

The Commission's proposal in the *NPRM* would reverse that 36-year course. Rather than use the *Computer Inquiry* and MFJ definitions as a tool for limiting the reach of incumbent LEC market power – definitions codified by Congress in 1996 – the Commission would instead unleash that market power to an unparalleled degree. In doing so, the proposal would lead to absurd results, several of which Z-Tel outlines in these Comments.

Rather than embark on the path outlined in the *NPRM*, the Commission should instead decide that even if the incumbent LEC is providing information services over a network facility the incumbent is still in fact providing "telecommunications services" as well. Under this interpretation, Congress's interconnection and unbundling regime remains intact, as would appropriate state regulation, and the consumer protection and law enforcement provisions of Title II. This result is dictated by principles of statutory construction, because the Commission must interpret *all* of Congress's mandates in the Communications Act to have substance and meaning.

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COMMENTS OF Z-TEL COMMUNICATIONS, INC.

The Federal Communications Commission's proposal in this proceeding represents yet another distraction from the agency's core mission that emanates from the Telecommunications Act of 1996: the development of local competition for mass-market, residential and small business consumers. Indeed, if the Commission treads down the path proposed in the *NPRM*,[1] it would actually undermine Congressional intent, dismantle the policy framework of the 1996 Act, and adversely impact competitive choice for all consumers.

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[1] *In the Matter of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers, Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguard and Requirements*, CC Dockets No. 02-33, 95-20, 98-10, Notice of Proposed Rulemaking, FCC 02-42 (rel. Feb. 15, 2002) (hereinafter "*NPRM*").

I. INTRODUCTION: THE PROPOSAL'S IMPACT ON MASS MARKET COMPETITION

Z-Tel Communications, Inc. ("Z-Tel") is among the nation's largest, competitive providers of mass-market local telephone service. Z-Tel's services are available to residential consumers in 38 states, and Z-Tel has over 250,000 retail subscribers. Z-Tel utilizes the Unbundled Network Element Platform to provide local services throughout the Bell operating company and Verizon/GTE territories nationwide and not just in large cities or towns. Indeed, because of the unbundling provisions of the 1996 Act, Z-Tel's services are available to over 80% of the U.S. population *today*.

To offer these ubiquitous services Z-Tel relies on *ubiquitous* availability of unbundled access via Section 251(c)(3) to the incumbent LEC local networks, including the last-mile infrastructure. To profitably serve mass-market consumers, Z-Tel must keep costs of customer acquisition low and therefore relies upon mass-market advertising techniques to acquire customers. Without ubiquitous availability, the effectiveness and efficiency of mass-market advertising techniques is seriously undermined.[2] If competitors' ability to use mass-marketing techniques is hampered because a certain percentage of the reach is un-addressable, mass-market consumers throughout the region, state or country will be injured because they will see less competitive entry. At issue in this proceeding is not simply competition for "broadband" services but competition for *all* local telecommunications services, especially competition for mass-market consumers of analog phone service.

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[2] For instance, what good is a radio advertisement if a considerable portion of the population cannot be served by Z-Tel because the incumbent has been able to shut off access to competitive entry in entire towns or neighborhoods? *See* Z-Tel Public Policy Paper No. 5, *Some Thoughts on Impairment: An*

And make no mistake – the broader issue *is* what this proceeding is about. The Commission's proposals would risk giving incumbent LECs the ability to render *any* portion of that last-mile infrastructure "unbundleable" for any service once the incumbent LEC chooses to offer a particular form of Internet access service over those facilities. If the Commission permits that to happen, ubiquitous market entry by competitors like Z-Tel would be seriously undermined and made potentially impossible. And since ubiquitous entry is an important and critical component of providing mass-market local services – even narrowband, analog POTS service – walling off particular town and neighborhoods could have the effect of shutting down mass-market competition entirely. As a result, Z-Tel – and indeed, all mass-market consumers of all local telecommunications services, even narrowband analog voice service – has a crucial interest in this proceeding.

II. THE COMMISSION'S PROPOSED CONSTRICTION OF STATUTORY DEFINITIONS ARE CONTRARY TO THE 1996 ACT AND COMMISSION PRECEDENT

A. The *Computer Inquiry* and MFJ Definitions and Subsequent Codification in the 1996 Act Are Intended to Prevent Abuse of Incumbent LEC Market Power

Observers regard the Commission's *Computer Inquiries* definitional framework as one of the Commission's most significant common carrier success stories – a framework that has spawned the development of the Internet and advanced communications services.[3] In the 1996 Act, Congress correspondingly (and wisely)

Economic Analysis of the Impairment Standard of the 1996 Telecommunications Act (April 2002), availble at www.z-tel.com, at 11-12 (discussing mass marketing costs).

[3] *See, e.g.,* Jason Oxman, FCC, *The FCC and the Unregulation of the Internet*, OPP Working Paper No. 31 (July 1999) at 10 (recognizing importance in *Computer* regime of keeping "safeguards in place to ensure that competing data providers had nondiscriminatory access to the underlying communications components of their service offerings.").

adopted the Commission's longstanding definitions of common carrier, basic and enhanced services into section 3, 47 U.S.C. 153. Even if the Commission wanted to, it cannot unilaterally change theses definitions to fit the whim of a policy climate that stands ready to reward incumbents for their refusal to implement the market-opening provisions of the Act.

What is often misconstrued about these definitions is the fact that the definitions in the *Computer Inquiries* were designed to address the fundamental issue of market power in the local exchange. The Commission's definition of "enhanced services" in *Computer II* did indeed lead to a proliferation of new and largely unregulated information technologies – but the success of that endeavor was *not* simply because those new information services were "deregulated" *but also because* the *Computer* framework prevented AT&T from leveraging its local network monopoly to extend its market power into those new services. Similarly, the MFJ deliberately restricted and later regulated the BOCs ability to offer "information services" as a way of walling off that market from BOC market power. The definitions of "basic", "enhanced" services in *Computer II* and "information services" in the MFJ were later codified by Congress in the 1996 Act in the definitions of "telecommunications services" and "information services."[4]

The last-mile network market power that has not subsided since those walls were put in place. In the recent *CPE/Enhanced Services Bundling Order*, the Commission correctly decided that "incumbent LECs have market power in the provision of local

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[4] *NPRM* at n.38.

exchange services."[5] The Commission also noted that "enhanced service providers remain dependent on incumbent LECs for local access to their customers. . . . We recognize that incumbent LECs may be able to leverage control over their local exchange facilities into market power over new or existing services."[6] Indeed, the Commission has recognized that those circumstances have been in place since at least 1966, when the Commission launched the *First Computer Inquiry*. Are we to believe that a market condition that had existed for at least 35 years has been magically solved in the last year?

Incumbent LECs are required to unbundle their networks for a reason: because they have market power in the provision of services that utilize the last-mile local network and are substantially protected by considerable entry barriers. With regard to the BOCs and GTE in particular, those entities were the subject of massive antitrust litigation that hinged on this market power. In other words, the "regulatory disparity" between incumbent LECs and other communications service providers is there for a legitimate reason – incumbent LECs have market power by virtue of their ownership of the local exchange network and that market power threatens competition in other adjacent service markets. The market power inherent in that bottleneck transmission facility does not change simply because the incumbent LEC decides to deploy a different service over that network and give it a new, fancy name.

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[5] *Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934, as amended; 1998 Biennial Regulatory Review—Review of Customer Premises Equipment and Enhanced Services Unbundling Rules in the Interexchange, Exchange Access and Local Exchange Markets*, CC Docket Nos. 96-91 and 98-183, Report and Order, 16 FCC Rcd 7418 at para. 30 (2001).

[6] *Id.* at ¶ 58.

Yet the Commission's proposal in the *NPRM* would reverse that 36-year course. Rather than use the *Computer Inquiry* and MFJ definitions as a tool for limiting the reach of incumbent LEC market power – definitions codified by Congress in 1996 – the Commission would instead unleash that market power to an unparalleled degree.

The Commission's proposal would even appear to permit an incumbent LEC to cease their provision of *any* "telecommunications service" altogether if it so choose – meaning that, ultimately, an incumbent LEC could magically transform itself, all of its networks, operations, and employees into something that is no longer a "local exchange carrier" and therefore no longer be subject to state regulation, Title II (including CPNI section 225), and the Section 251 and 252 obligations of interconnection and unbundling. The authority of state commissions to regulate the terms and services of intrastate communications in that situation would be significantly hampered, no doubt necessitating multiple layers of additional regulation in the future. Could Congress have conceivably intended for the possibility of such regulatory alchemy?

B. The Commission's Proposed Construction of the Definition of "Information Services" Would Lead to Absurd Results

The NPRM asks whether Congress, through the definitional sections of the 1996 Act, created a loophole that would allow incumbent LECs to free last-mile bottleneck facilities from Title II constraints whenever they use those facilities in part to carry "information services," even if the incumbent LEC bundles telecommunications services with the sale of those information services.

The Commission's interpretation would lead to absurd results and is therefore clearly in conflict with Congressional intent. At the time the 1996 Act was passed, Bell companies and incumbent LECs were *already* providing "information services" over

their bottleneck last-mile networks.[7] As a result, if this statutory loophole exists, it would have been available immediately at the time of passage. All an ILEC would need to do is declare itself to be no longer a "common carrier" wherever it offered a bundled telecommunications/information service, and Title II would no longer apply. Such a construction is patently absurd, because Congress clearly believed that Title II (especially Sections 251 and 252) applied to incumbents – the BOCs, GTE, and independents – when it passed the 1996 Act.

In addition, the Commission will be hard-pressed to confine the loophole to the "broadband" capabilities of local networks. The Commission readily admits that the terms "broadband" and "broadband services" are "elusive concepts."[8] In the definitional provisions at issue, Congress makes no distinction between "information services" that utilize "broadband" or those that utilize "narrowband" "telecommunications." Whatever loophole the Commission discovers regarding self-provisioned private carriage of "broadband" Internet access runs the risk that the ILECs would seek to apply that loophole to narrowband, voice services as well. Currently, bundles of local, long-distance and enhanced services for narrowband voice applications (including services like Z-Tel's Z-LineHOME and Z-LineBUSINESS) are proliferating in the market.

As a result, can the Commission truly confine the scope of this evisceration of decades of precedent to only "broadband" services? And what happens 36 years from now, if today's definition of "broadband" seems pitifully slow compared to the

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[7] Indeed, non-BOC incumbent LECs could provide such information services on an integrated basis, not subject to the projections of the *Computer II/III* ONA/CEI regime.

[8] *NPRM* at n.2.

bandwidth needs of tomorrow? Will the Commission be able to invent yet a third definitional category (perhaps "super-duper broadband"), to which even a different set of rules would apply? Is this what Congress really intended when it set out to define "telecommunications services" and "information services" in a technologically-neutral way?

The Commission's proposed construction of the definition of "information services" leads to these problems because the Commission is seeking to use these terms to accomplish a goal Congress did not intend. These definitions were written after decades of experience with the *Computer Inquiries* and the MFJ, where the definitions were utilized as tools to prevent the BOCs from leveraging their market power in the local exchange so as to adversely affect competition for "enhanced" or "information" services. The Commission is now seeking to use those same definitions not to limit the effect of ILEC market power into other markets but to break down affirmatively that wall and unleash that market power on the information services industry. That purpose is incompatible with the purpose of the statutory definitions and framework of Title II.

C. The Implication of the Commission's Proposal Upon Unbundling of "Network Elements" Leads to Even More Absurd Results

The *reducio ad absurdum* does not stop there. In paragraph 61 of the *NPRM* the Commission directly observes that its proposal would seem to undermine the ability of carriers to obtain unbundled access to "network elements" of the incumbent LECs. The Commission's theory is that if an ILEC can transform its local bottleneck facilities into de-regulated "information service" facilities, then those facilities may not be regarded as

"network elements", because "network elements" only include facilities that are "used in the provision of a telecommunications service."[9]

In a normal exercise of statutory construction, this consequence of the Commission's tentative conclusion would normally pose a problem. Just as an econometrician should probably reconsider his model if it indicates consumers would buy more of something as the price increases, the Commission should re-think this proposal if the consequence of that proposal is to render moot entire provisions of Title II.

Congress wrote the definitions of "telecommunications service", "telecommunications", "information service", "network element" and "incumbent local exchange carrier" in the same piece of legislation in which it ordered in section 251 that those "incumbent local exchange carriers" provide "unbundled" access to those "network elements." Certainly, Congress must have intended that *something* be provided on an unbundled basis by someone.

But, as paragraph 61 recognizes, the Commission's expansive interpretation of "information services" threatens to swallow up and render useless the definitions of "incumbent local exchange carrier" and "network element." Is it even conceivable that Congress would give incumbent telephone companies such an "easy out" – that they could simply bundle and sell *via* private carriage information services with their telecommunications services, which would make them no longer "common carriers" and also render their entire local network exempt from unbundling because it would no longer be a "network element"? Why would Congress go through the trouble of writing and debating the terms of sections 251, and 271 if those obligations were so easily avoided?

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[9] 47 U.S.C. 153(29) (definition of "network element").

Nothing in the definition of "network element" suggests that the incumbent has the ability to bring facilities into or out of that definition simply by bundling information services with the telecommunications services it provides over that facility. If the Commission adopts its proposal, what would happen if the incumbent decided to bundle free voice mail or free dial-up Internet access to all of its local customers? Dial-up Internet access utilizes *all* of the same network facilities that telephone exchange services utilizes. Would the offering be an "information service" if a local phone company bundled free dial-up Internet access with voice service to all of its customers? If so, does this mean that the local phone company is no longer providing "telecommunications service" to all of its customers? Does this then mean that the local phone company no longer needs to provide unbundled access to *any* of those local exchange facilities – loop, switch, interoffice transport, NIDs, etc. – that it used to provide dial-up Internet access any longer because they no longer supported a "telecommunications service"? Can it possibly be that all an incumbent LEC need do is drop a "Free Dial-Up Internet Access" CD-ROM in the mail to all its customers to free itself of unbundling obligations? How is this scenario legally different than an ILEC selling a "broadband wireline Internet access service" that contains IP voice telephony capability? Is there any legal or practical difference between the two scenarios, other than the quality of bandwidth the end-user receives? If the bandwidth does make the difference, where in the statutory definitions does Congress permit the Commission to draw that distinction?

Or consider the example of the network interface device, or NID. The NID is a simple terminal device that manages the interface between a customer's inside wiring and the local loop. There is a NID at everyone's house and place of business. The NID is

also a "network element" that incumbents are currently required to unbundle pursuant to Commission Rule 51.319. DSL copper loops and voice-grade copper loops both terminate at the same NID at the customer's premises. If the Commission adopts its proposed definitions and framework, what would stop an ILEC from stating that any NID that could terminate a "broadband" DSL line is now an "facility" that it uses to provide "information services" so that it is no longer a "network element" that is subject to unbundling? What happens to the ability of competitors like Z-Tel to access the copper, voice-grade loops that already terminate at those NIDs? Would Z-Tel have to install a new NID for each one of its customers? What impact would that have on developing competition via *any* entry strategy that relies upon unbundled local loops? Would the increased costs of requiring CLECs to self-provide NIDs be insurmountable to support competition for mass-market customers?

The implications of the Commission's statutory interpretation would also extend to BOC Section 271 obligations. The section 271 checklist sets forth several specific network elements that BOCs must provide to competitive carriers in order to provide interLATA services. In particular, the checklist requires that "loop transmission", "transport" and "switching" be provided on an "unbundled" basis. Section 271(d)(4) also provides that "[t]he Commission may not, by rule or otherwise, limit . . . the terms used in the competitive checklist."[10] If the Commission's interpretation of "information services" removes certain types of local loops, switches, or transport from BOC unbundling obligations, as the Commission suggests in paragraph 61 of the *NPRM*, has

[10] 47 U.S.C. 271(d)(4).

not the Commission "limit[ed]" the availability of "loop transmission", "transport" and "switching" in a manner inconsistent with section 271(d)(4)?

It is not an option for the Commission and BOCs to satisfy their checklist "unbundling" requirements through "unbundling" pursuant to section 201. In the Senate Report that accompanied the provisions of the bill that were the predecessors to sections 251 and 271 states that "the Committee intends the competitive checklist to set for what must, at a minimum, be provided by a Bell operating company in any interconnection agreement approved under section 251to which that company is a party . . ."[11] As a result, if the Commission proceeds with its definition of "information services" and that decision has the consequences of limiting unbundled access, that decision warrants the revocation of 271 authority for a BOC that would no longer be subject to all of the strictures of section 251 unbundling. A BOC cannot be regarded as providing the elements of the checklist – which spells out what network elements must be "at a minimum" provided in section 251 agreements – if it is no longer under any legal obligation to provide unbundled access pursuant to section 251.

Normally, problems and inquiries like these would lead one to question the soundness of the original interpretation of the term "information services" that led logically to these difficult questions and scenarios. But the Commission does not go that direction. In paragraph 61, the Commission instead asks for comment as to whether and to what extent it can replace the section 251 network element unbundling regime with some kind of parallel set of rules promulgated pursuant to Title I. The very fact that the Commission must even contemplate establishing a parallel unbundling regime

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[11] S.Rep. 104-23, 104th Cong., 1st Sess. 43 (1995).

demonstrates the radical nature of its proposed definitions and its inconsistency with Congressional intent.

The answer is simple: the Commission should decide that if an incumbent LEC is providing information services over a network facility, the incumbent is still providing "telecommunications services" as well. Under this interpretation, Congress's interconnection and unbundling regime remains intact, as would appropriate state regulation and the consumer protection and law enforcement provisions of Title II. This result is dictated by principles of statutory construction, because the Commission must interpret *all* of Congress's mandates in the Communications Act to have substance and meaning.

III. CONCLUSION

The Commission should not be faulted for thinking about the availability of competitive broadband services to American consumers. The 1996 Act promised American mass-market consumers competitive alternatives for voice, video and data services – competitive alternatives that have generally not materialized. The Commission should analyze why competition has not developed for mass-market American consumers at the massive scale Congress intended.

But what the Commission should be faulted for is the apparently hasty and incomplete analysis of the consequences of its proposals in the *NPRM*. The telecommunications industry is in a tremendous state of flux and financial turmoil – and rather than promoting regulatory uncertainty, the Commission has instead injected it, by proposing to overturn over three decades of precedent.

The proposed expansive interpretation of "broadband wireline Internet access" service set forth in the *NPRM* would wreck havoc on the Communications Act of 1934, as amended, Congressional intent, and state regulatory policy. The purpose of the *Computer* regimes, the MFJ, and Congress's subsequent codification of those definitions in 1996 was to wall off or shield the information services industry from the market power in their incumbent local networks. In other words, **Congress affirmatively decided to treat incumbent LEC networks differently** – in "disparity" to other providers, if you will – for legitimate reasons: only the incumbent LECs own networks that pass virtually every home and business in America, only incumbent LECs have greater than 90% of the market for local phone service, and only the incumbent LECs were bequeathed this dominant market position by 60-plus years of guaranteed local monopolies.

In the end, the Commission's proposal is inconsistent with basic principles of statutory construction because it would read out entire swaths of Title II of the Communications Act. Congress wrote the rules this way, and nary a legislative session has passed recently without the ILECs trying to get Congress to change its mind. Congress has not – and the Commission cannot change Congress's mind and preempt state commissions by regulatory fiat.

Respectfully submitted,

/s [submitted electronically]

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